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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 18 2005

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a dancer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director erred in requiring evidence that distinguished the petitioner from other members of the touring company "Riverdance: The Show" and determining that the petitioner's eventual plans to teach were disqualifying. We agree with counsel that the director's concerns regarding the petitioner's eventual plans to teach are misplaced. The petitioner intends to continue dancing, as acknowledged by the director. Due to the physical nature of dance, it is not realistic to expect dancers to continue their dancing careers as long as researchers, engineers or business professionals. Under the director's analysis, no dancer or athlete would be able to qualify for the national interest waiver. Thus, we withdraw the director's findings on this issue. For the reasons discussed below, however, we concur with the director's concern that the evidence does not sufficiently distinguish the petitioner from other members of her troupe.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As stated above, the director found that the petitioner is an alien of exceptional ability. That classification, however, normally requires a labor certification. Thus, the only issue to be decided is whether a waiver of that requirement is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its

report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, Irish step dancing, and that the proposed benefits of her work, awareness and enjoyment of this form of dance, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Initially, counsel asserted that the petitioner qualifies for the national interest waiver because she actually meets the eligibility requirements for a higher classification, aliens of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. As stated above, the director concluded that the evidence did not distinguish the petitioner from other members of her troupe. On appeal, counsel asserts that the director applied to strict a

standard; such distinction is only required for aliens seeking eligibility pursuant to section 203(b)(1)(A) of the Act. While an alien need not establish eligibility pursuant to 203(b)(1)(A) to obtain a waiver of the labor certification requirement in the national interest, we note that such eligibility is the basis of counsel's initial claim. In fact, counsel continues to assert that the petitioner has distinguished herself from other members of her troupe.

We cannot conclude that the national interest waiver was intended as a blanket waiver for every member of a large dance troupe that successfully tours nationally. Thus, while the petitioner need not demonstrate the type of personal national acclaim required for aliens of extraordinary ability, some evidence distinguishing her from other members of the large troupe (42 dancers) is required.

The petitioner was not a member of the original "Riverdance" cast that arguable deserves credit for influencing the field when it premiered in 1995 according to the background information provided by the petitioner. Rather, she joined a "clone" troupe, "Riverdance: The Show" in 1997, after "Riverdance" was already an international sensation. While both troupes are viewed as equally talented, with no "B" cast, the record lacks evidence that the "Riverdance: The Show" cast is breaking new ground in the same way as the original cast did.

We note that the record contradicts one of counsel's assertions regarding the petitioner's distinction. Specifically, counsel asserts:

> Both the *Calgary Herald* and the *Edmonton Journal,* featured [the petitioner] in an article which discussed the tremendous success of the show and how her role in the show can vary from night to night, because she is one of only two dancers trained for "every spot in every number."

The actual quote in both articles, both identical and written by Alison Mayes of the *Calgary Herald* states:

> [The petitioner's] Riverdance roles vary from night to night, since two dancers are trained for every "spot" in every number.

Thus, it is clear that every role has two dancers who are prepared to perform that role, not that two dancers are prepared to perform every role as stated by counsel. The article does not state or imply that it is atypical for the petitioner to be trained in several roles as each role must have two dancers prepared to perform that role. Conceivably, all dancers are trained in multiple roles, especially given the petitioner's statement that injuries frequently fare up, up to four dancers have been unable to dance at one time and "if you even mention that you're slightly injured, they don't put you on for risk of further injury."

Peter Smith, Vice President of the Irish Dancing Commission, asserts that the petitioner "was one of only two female dancers given full contracts with ['Riverdance.']" Mr. [redacted] does not explain how he has first hand knowledge of this fact and the references associated with "Riverdance" do not confirm this assertion. [redacted] the casting director for "Riverdance," praises the petitioner's audition and asserts "we immediately offered her a contract for the new touring company," but does not indicate other dancers accepted into the cast were not offered similar contracts. Even Mr. [redacted] account is somewhat inconsistent with other information in the record. In an interview in *Focus,* the interviewer provides the following account of the petitioner's "Riverdance" audition:

She wasn't sent home with good news - in fact, she had no idea how well she did at all.

"They didn't tell us anything (at the audition)," [the petitioner] said. 'the six of us were in the final line-up dancing our faces off, and that was it."

"They just told us they'd be in touch."

It wasn't until [the petitioner] heard at other competitions throughout the year that she had been one of three Canadians to be chosen for the troupe she auditioned for.

[redacted] founder of the Comerford School of Irish Dance, asserts that the petitioner was made "assistant Dance Director for Riverdance, a position which was only ever given to a person from Ireland." Once again, Mr. [redacted] does not explain how he has first hand knowledge of this position and Mr. [redacted] does not confirm this assertion. Rather, Mr. [redacted] asserts that the petitioner "was so valued by the company that she was asked to do an administrative secondment at the Riverdance headquarters in Dublin. She worked at the office there for 4 months in 1999 and co-ordinated the Irish Dance troupes of three touring companies and also a promotional event team, over 150 dancers in total." These duties appear administrative, and not based on the petitioner's abilities as a dancer.

In response to the director's request for additional evidence, counsel asserts that the petitioner's distinction within the troupe is evident from her salary. Counsel relies on a letter from [redacted] Contracts Manager for the producers of "Riverdance: The Show." Mr [redacted] states:

> To the best of my knowledge, an average Irish Dancer in the entertainment industry would normally earn a fee of approximately US$500.00 per performance week. However, [the petitioner] was paid US$755.00 per week to perform with **Riverdance – The Show** as Abhann Productions was very keen to retain the services of a dancer of [the petitioner's] abilities on an ongoing basis.

That the petitioner earns more than the *average* Irish dancer in the industry is not persuasive. Regardless, the letter does not establish the significance of the petitioner's role within the troupe. Significantly, the petitioner's October 2001 contract indicates that her wages were $508 per performance week for the first year, $635 per performance week after one continuous year, and would only reach $755 per performance week after the provision of services for three continuous years. Thus, the petitioner's wages appear based on her number of years of experience rather than unique talent. As stated in *Matter of New York Dep't of Transp.* 22 I&N Dec. at 222, the number of years of experience is simply one criteria for aliens of exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *Id.*

The media coverage of the petitioner is local to her place of residence and only singles her out as a Canadian selected to perform with "Riverdance." They do not distinguish her as a particularly influential member of the troupe. We note that the documentary appears to have been created by a subsidiary [redacted] of the company that produces "Riverdance: The Show" [redacted] Moreover, the General

Manager of [redacted] asserts that the documentary only aired "on local programming." While the documentary follows the experience of petitioner and a fellow Canadian with "Riverdance: The Show," it does not suggest that the petitioner's dance has been particularly influential in the world of Irish dance.

As the evidence discussed is not persuasive evidence distinguishing the petitioner from the members of the three touring Riverdance troupes, the remaining letters providing general praise of the petitioner's talent are insufficient. On appeal, the petitioner merely resubmits documents already part of the record of proceedings and considered above.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.